



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 133(N) of 2008

1. ALPHONSE MWANGEMI MUNGA
2. PETER MUCHIRI MURIUNGI
3. MICHAEL ONYANGO OCHIENG'
4. PETER N. MAKAU
5. CHIVATSI KATAMA
6. MARICOS NYAMWANGA OKONGO
7. STEPHEN NZIOKA KASINA
8. SHADRACK C. LEWA
9. BENEDICT ORWARU
10. NICHOLUS MOKI
11. JAMES KINGELE (Suing on their own behalf and)

on behalf of 367 employees of

African Safari Club APPLICANTS/CLAIMANTS

VS

AFRICAN SAFARI CLUB LIMITEDRESPONDENT

AND

1. KARL J. RUEDIN
2. HANS PETER RUEDIN
3. SANDRA REUDIN
4. HAPERO SHIPPING LIMITED..... OBJECTORS

RULING

The Applications before court are the ones dated 11th October, 2012 and 12th October, 2012.

The application dated 11th October, 2012 was filed on 12th October 2012 through the firm of Moses Mwakisha and Company Advocates. The application was brought under Section 26 of Labour Institutions Act, 2007, and Rule 32 Industrial Court (Procedure) Rules 2010 and the court's inherent powers, Order 22 rule 22 of the Civil Procedure Rules and all other enabling provision of law.

The applicants seek orders:

- 1. THAT owing to the urgency and for reasons stated, service of this application and the memorandum of review upon the respondents be dispensed with in the first instance and the court to give directions as to service.**
- 2. THAT pending hearing and disposal of the application or review filed herewith there be a stay of sale in execution of the decree herein.**
- 3. THAT this Honourable court be pleased to review its ruling/order of 19th September, 2012 herein in terms of the memorandum filed herewith.**
- 4. THAT the costs of this application be provided for.**

WHICH APPLICATION shall be based on the affidavit of KARL JACOB RUEDIN sworn and filed herein the grounds borne in the schedule hereto and on such other or further grounds as shall be adduced to the hearing hereof.

The application is supported by an affidavit sworn by one Karl Jacob Ruedin sworn on 11th October, 2012.

The Applicant submitted before court that as per the court record of November, 2011, two applications both dated 25th August, 2011 were heard by Justice Chemmutut. The applicant here challenged the validity of the decree and sought the setting aside of the warrants of execution of decree as drawn at the time. The Applicants contend that a look at the award made by Hon. Chemmutut show that he awarded 50 million plus 6 months compensation which was never quantified as ordinarily the parties were to go before the Registrar or Labour Officer for computing. However, the Claimants made their own computation which formed the basis of the execution. On same day, an application by the Objector was also argued challenging validity of execution process as it related to service and proclamation on the company.

The Applicants argue that the ruling delivered by the court on the Application does not match the record as to the other issue of the decrees' validity was not handled. The Applicants submitted that this was an error apparent on the face of the record and is therefore a matter of review and not appeal. The applicants aver that if execution proceeds now, the other application would not have been addressed. The Applicants contend that they are not guilty of delay as they filed this application 3 weeks after the ruling.

For the Objector, the Applicants filed their application dated 12th October, 2012. The application was filed through the firm of Sijenyi and Company Advocates. The Application was brought vide Section 26 of the Labour Institutions Act, 2007, rule 32 of Industrial Court (Procedure) Rules 2010 and all other enabling provisions of Law. The Applicants seek orders:

- 1. THAT owing to the urgency and for reasons stated service of this application upon the respondents be dispensed with the first instance.**
- 2. THAT this Honourable court be pleased to review its Order of 19th September, 2012 to the extent**

following namely;

- (i) That the goods specified in page 6 of the Ruling having been accepted as pertaining to the objectors be incorporated in the final orders relative to the goods to be released to the said objectors.**
- (ii) Motor vehicle registration No. KBJ 566 L belonging to the 2nd objector and in respect of which there is proof of ownership on record be released to the said objector.**
- (iii) That motor vehicle No. KAB 782P registered in the name of ELIUD MAHIHU and explained in the supporting affidavit as pertaining to the 1st objector as beneficial owner to be released to the 1st objector not least because it does not belong to the respondent/judgment debtor and its presence on the 1st objector's private property has been adequately explained.**

3. That pending hearing and disposal of this application there be stay of advertisement and/or sale or the specified properties.

4. That the costs of this application be provided for.

WHICH application shall be based on the Supporting Affidavit of KARL J. RUEDIN sworn and filed in support thereof and on such other or further grounds as shall be adduced at the hearing hereof.

The application is supported by an affidavit sworn by Karl Jacob Ruedin sworn on 11th October, 2012. The Objectors seek review of the orders made on 19th September, 2012. They aver that there is an error apparent on record as far as part of the goods whose proof of ownership the court has accepted have by omission been omitted from the final orders relating to release to the objectors. They contend that motor vehicle KBJ 566 Z KIA Sportage where ownership was found to belong to 2nd Objector was apparently overlooked. They state that in this court's ruling paragraph 2, line 9 and 10, the court stated that there was evidence shown of 2 motor vehicles for 1st and 3rd Objector. They aver that as to KBJ 566L, KIA sportage where ownership court found belong to 2nd Objector was apparently overlooked.

They state that in this court's ruling paragraph 2, line 9 and 10, the court stated that there was evidence shown of 2 motor vehicles for 1st and 3rd Objectors. They aver that as to KBJ 566L, there was a document exhibited in supporting affidavit of Karl J. Ruedin sworn on 25th August, 2011 at page 21 of the affidavit in which is annexed a copy of the record from KRA showing that the vehicle belong to Ruedin Hans Peter, the 2nd Objector.

Ground 3 of the motion relates to motor vehicle KAB 782 P belonging to Eliud Mahihu which Objector Karl Ruedin stated he is a beneficial owner. That the only goods to be attached are those of African Safari Club. As to the other goods, the Objector contend that they were all found at the private residence of 1st Objector. He had possession of these goods. Some of the goods attached were household goods where receipts are not available.

In reply to Respondents contention that Applicants have come to court late the Applicants contend that the court should overlook this technicality and do justice. They also state that this right should not be denied. As to the affidavit served on Respondents which is not dated nor signed, the Applicants state that it may have been an oversight as the copy in court is signed.

They submit that the court is not *functus officio* and ask the court to allow their application.

In reply to the two applications, the Respondents oppose them. They submit that the Applicants have cited provisions of the Labour Institutions Act which provisions have not been complied with by 2nd Applicant/1st Objector for payment of salaries to employee.

On Decree, the Respondents submit that it is valid as it has not been set aside or reviewed. They state that

the Applicants have never come up with their computation and neither have Applicants paid the Respondents for over 10 years. That this leads to an unfair relationship. They state that the 1st Objector is the Managing Director of Respondent and Rules of equity demand that he who seeks equity must do equity. Then it follows that he who seeks Labour protection must act in good faith and fairness

The Respondents submitted that the ruling captures issues that were raised e.g. for KAB 782P belonging to Eliud Mahihu, there is no objection by administrator of his estate or if he alive, by himself. They aver that if the view is taken that if the beneficial interest is in the 1st Objector, then the other items are in the beneficial interest of the claimants.

They submitted that over 3 weeks delay is unreasonable considering circumstances of this case as goods were attached and auctioneers were given 7 days notice to attach. That a stay was also denied by the court and cannot be given now. They state that the Applicants were prompted to come to court owing to adverts for the sale of the goods. The applications were therefore an afterthought and the Respondent urged court to reject them accordingly.

Having heard the submissions of all parties herein, I will revert back to the court record. I will first address the 1st Application, the one dated 11th October, 2011. It is apparent that both the application dated 11th October 2011 and one of 12th October, 2012 were argued before this court. It was an omission by this court not to address the matters raised in 1st Application. I will now address them in this ruling. The Auctioneers who carried out proclamations were also asked to appear in court and were subjected to cross-examination in respect of the manner in which they carried out the proclamation and attachments.

Also from the court record, it is apparent that the judgment given by Justice Chemmutut delivered on 28th April, 2011 awarded specific figures – Item No. 2 awarded relate to 6 months compensation based on individual wages or salaries for each employee. The Applicants contend that they ought to have been invited to compute the figures or the same ought to have been computed by a Labour Office or Registrar.

Rule 30 (2) of the Industrial Court (Procedure) Rules 2010 states that;

“An order or a decree shall be drawn in accordance with the decision of the Court and shall specify clearly in paragraphs the relief granted and any other determination and costs, if any”.

There is no provision that computation is done by the Registrar or Labour Officer. In practice, a decree is drawn by the beneficiaries and in this case by the claimants. It is usually served on the Respondents. It is upon service of such a decree that the Respondents if they object to any portion of it can approach court for its review. In this case the decree was extracted as per the award. It was served on the Respondents. They never objected to it until after the execution process had began.

I believe the Respondents slept on their rights. They are guilty of delay. They are estopped by their own conduct from claiming at this eleventh hour that the decree had a problem. In any case, considering the decree drawn, it is based on the award given and I decline to review and/or vary it.

Now to the second application, the applicants contend that there was evidence adduced that motor vehicle KBJ 566L KIA Sportage belong to end Objector as per exh No. 21. However the said evidence was not attached to the affidavit filed in court as alleged by the Applications. The 2nd result is that there is no evidence that motor vehicle KBJ 566L belong to the 2nd Objector.

Lastly on the motor vehicle No. KAB 182P belonging to Eliud Mahihu there is still no proof that the Objection should be Eliud Mahihu or the Administration of his estate if he is deceased. The upshot is that there is no proper ground proved before this court that would warrant a review of the Application.

The upshot is that prayers sought by the Applicants on the 1st Application on the award have now been addressed in this ruling. On the 2nd application, nothing warranting a review is addressed. The

applications are declined with costs to the Respondents.

Read, signed and delivered this 16th day of November, 2012.

HELLEN WASILWA

JUDGE

Appearances:

Karauka for Moses Mwakisha and for Claimant

Company Advocates

Omolo holding brief for

Sijenyi and Company Advocates for Objectors

Leah Muthaka Court Clerk